IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 65.

THE UNITED STATES, *Petitioner*,

v.

CALLAHAN WALKER CONSTRUCTION COMPANY, *Respondent*.

On Writ of Certiorari to the Court of Claims.

APPLICATION FOR REHEARING.

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Respondent respectfully requests that this case be reconsidered and remanded to the Court of Claims for additional findings of fact on the principle of *Helvering v. Rankin*, 295 U. S. 123. *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1.

The judgment of the Court of Claims is based upon its findings that the cost of the added work was substantially double the contract price of 14.43¢ per cubic yard, and that the contracting officer made no adjustment to cover such added cost. The Court of Claims also makes the specific

finding that there was not "sufficient suitable material for levee construction within the right-of-way assigned the contractor" to supply the additional yardage required at the sector under the change of design in the levee (R. p. 8), and that the tower machine used by the contractor would not reach the place at which suitable material could be found. (R. p. 8). These facts existed at the time of the change order of October 18, 1932, and had the contracting officer exercised the diligence required of him he could not have escaped knowledge of same. These facts were overlooked by the contracting officer when he considered the matter of changing the design of the levee.

As the case now stands the contractor is penalized although acting in good faith under the findings of fact by the Court of Claims, while the Government is given a premium because the contracting officer says he "failed to see a condition" that was clearly obvious to *any person* acting in good faith; and with an honest purpose under the circumstances. See *United States* v. *Smith*, 256 U. S. 11. The Court of Claims also finds that—"suitable material *did not exist* in depth to more than two or three feet in the borrow pit area, and the territory possible of excavation for levee material, *under the revised plan*, was extended beyond the limits contemplated by the contract" (R. p. 8). That under the original plan of the levee there was not sufficient suitable material directly in front of the new levee (R. p. 8). Such facts could not have escaped the attention of the contracting officer, and his failure to give them due consideration *in estimating* cost of added work is certainly not an act of good faith (see *United States* v. *Smith, supra*). The contracting officer could not honestly say there was sufficient suitable material available within reach of the contractor's equipment when as a matter of fact there was not (R. p. 8).

There is a positive finding by the Court of Claims (R. p. 8) that the contracting officer failed to ascertain the probable cost of the new "levee on berm", when it finds that

the material suitable for such construction *did not exist* within the reach of the equipment employed by the contractor up to the time of the change (R. p. 8); and in order to reach the material needed hauling equipment had to be employed (R. p. 8) or the needed material handled by relays of excavation equipment (R. p. 8).

The cost of building a "levee on berms" such as the new design called for at Stations 5113 and 5123 merely involved digging, moving and placing earth, it is true, but the added cost comes about by an increase in distance of movement of needed material. Equipment different from that used by the contractor must be employed which the contractor did not have; and the person who had such equipment available would not consent to its use by the contracting officer or the contractor without a promise to pay a reasonable rental price therefor. (See *United States* v. *Atlantic Dredging Co., supra*) The contracting officer knew that the contractor did not have suitable equipment, and that the increased distance of moving the earth would substantially increase the cost of the added work over the contract price. Such undisputed facts bear materially on the question of the good faith conduct of the contracting officer; and the fact that he may have considered them, but gave no weight to the importance of such facts as a basis of his decision (and the Court of Claims says he did not) is positive evidence that he did not act with an honest purpose and in good faith. (See *United States* v. *Smith, United States* v. *Atlantic Dredging Co., supra*).

The contractor was desirous that it be paid no more or no less than the *actual cost* of the added work; and was in no position to appeal from the order of October 18, 1932, before the work was done. Furthermore the contractor was given reasonable assurance by the contracting officer that if the added work cost more than 14.43¢ per cubic yard, payment of its actual cost would be made when the work was completed. (See *United States* v. *Atlantic Dredging Co., supra*)

The application for a rehearing is presented because counsel for respondent relied primarily upon the case of *United States* v. *Smith, supra,* as a basis for the suit, and urged the Court of Claims to make a finding on the evidence that the conduct of the contracting officer was arbitrary and capricious as regards added cost of the work (R. p. 16). The finding by this Court to the effect that the contracting officer acted in good faith and with an honest purpose as regards the added cost of the work is in conflict with *Helvering* v. *Rankin,* 295 U. S. 123 (79 L. Ed. 1343); and denies to the Court of Claims the right to make a finding on that phase of the case.

In the case of *Helvering* v. *Rankin, supra,* the Court says:

> "If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board * * * *and the same procedure is appropriate when the findings omitted by the Board might be supplied from examination of the record.*"

The consideration which the contracting officer gave to the necessities of making a change in the design of the levee at the sector covered by Stations 5113 to 5123 between the dates of October 7th and 14th did not contemplate an order that the contractor do any part of the new work, but that it would stand by with its equipment to top out the levee when the new work had been completed under the "force account of the Government". When the contractor protested against such an arrangement the contracting officer *arbitrarily* ordered the contractor to do a part of the new work at *the contract price.*

The finding made by the Court of Claims that the newly designed levee substantially increased the cost of the work over and above the contract price shows that the contracting officer *acted arbitrarily* when he refused to commit himself irrevocably to pay the actual cost thereof. The new work required at Stations 5113 to 5123 was wholly out-

side the terms of the contract; exceeded the pro rata allowable increase at that sector of Item A under the provisions of Section 12 of the specifications, and under such circumstances the order of October 18th should be *construed* as a mere request on the part of the contracting officer that the contractor place the added material at *actual cost*. The contracting officer says that he had "*actual cost*" in mind when he specified the contract price, and the contractor says it so understood the purpose of the order.

Therefore, since the Court of Claims has found the *actual cost* of the added work—which is not disputed by the Government—the law implies a liability of the Government to pay an amount (actual cost) which the contracting officer intended. If the contracting officer intended that the contractor do the added work at less than *actual cost*, the basic purpose of his order of October 18th was not endowed with the virtue of honesty; and is clear evidence of an act of bad faith. (See *United States* v. *Atlantic Dredging Co.*, *supra*)

Respectfully,

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SUPREME COURT OF THE UNITED STATES.

No. 65.—October Term, 1942.

The United States, Petitioner, *vs.* Callahan Walker Construction Company. } On Writ of Certiorari to the Court of Claims.

[November 9, 1942.]

Mr. Justice Roberts delivered the opinion of the Court.

This case involves the meaning and application of the terms of a standard form of Government construction contract.

The findings of the Court of Claims may be summarized. In 1931 the War Department asked bids for the construction of a levee on the east side of the Mississippi River. The respondent bid 14.43¢ a cubic yard on a section of the work involving approximately 3,881,600 cubic yards of earthwork. A paragraph of the specifications reserved the right to make such changes in the work contemplated as might be necessary or expedient to carry out the intent of the contract or to meet unanticipated conditions, but added that no such modification would be the basis for a claim for extra compensation except as provided in the regular form of contract to be entered into between the parties.

The respondent began construction at the south end of the project and proceeded northward. The length of the proposed levee was divided by stations one hundred feet apart and numbered from north to south. Sixty-eight per cent. of the construction between Station 5123 and Station 5113 had been completed when portions of the levee already constructed south of Station 5123 were found to have a tendency to subside. For this reason the Government contracting officer, on October 7, 1932, ordered the work stopped between the two stations while he sought to determine the cause of the subsidence. He concluded that the placing of an enlarged false berm, not called for in the original specifications, would prevent subsidence in the sector between the two stations. On October 18th he gave respondent a written order to construct such a berm; the order stated that respondent would be given one hundred per cent. credit for the earth placed

south of Station 5123 where the subsidence had occurred and that payment for additional yardage required by the false berm would be made at the contract price per cubic yard. The additional yardage involved was about 64,000 cubic yards. The work covered by the change order was necessary for the completion of the project. The order was issued against the respondent's protest that an extra price should be allowed as the additional work would cost the respondent more than 14.43¢ per cubic yard, and that the order was not within the terms of the contract. The respondent asserted it would later present a claim for extra cost occasioned it by the additional work.

Article 3 of the standard form of construction contract signed by the parties provides:

"Article 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. . . . Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed."

Article 15 provides:

"Article 15. *Disputes.* Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed."

The respondent did not appeal from the order of the contracting officer to the head of the department concerned. After completion of the work, the acceptance of the Government's final payment was under protest. Thereafter respondent brought this action for its additional costs over the price of 14.43¢ paid it for the extra work and was awarded a recovery by the court below.

The Government's defense was that, under the terms of the

contract, the contracting officer's decision as to what was an equitable adjustment involved only a question of fact and that if the respondent was dissatisfied with the officer's judgment the contract limited further recourse to an appeal to the department head. The court below overruled the contention by a vote of 3 to 2, one of the judges in the majority writing a separate opinion.[1] Two of the judges were of opinion that the contracting officer paid no attention to Art. 3 of the contract, made no adjustment, and, without considering the possibility of extra costs involved in the extra work, simply ruled that the contract price applied to it.

We cannot accept this view for several reasons. In the first place, there are no findings to support it. The findings show that the officer gave the matter consideration, reached a decision about it, and issued the order which gave respondent a credit to which it might not have been entitled under the contract, and fixed the rate of 14.43¢ per cubic yard for the extra yardage required by the change in the specifications. There are no findings that the contracting officer failed to ascertain the probable cost of the new work or that he did not honestly decide that the contract price would be a fair allowance for the extra work. If the conflict between the opinion and the findings were sufficient to require a remand for clarification this is obviated in the present instance by certification of the evidence which supports the following conclusions. Between October 7th, the date of the stop order, and October 18th, the date of the change order, the respondent's officials were in touch with the area engineer and the contracting officer, represented that there was not sufficient earth in the borrow pit opposite the sector in question but that the earth would have to be brought from other points, and that the contract price of 14.43¢ would be insufficient to compensate for the additional expense involved. The Government's representatives disagreed with the contentions. Prior to October 18th, however, after talking with the contracting officer, respondent's officials signified that they would proceed with the work as ordered, keep a careful record of the work done and its cost, and would later insist on payment of any cost greater than that specified by the change order.

All three judges who were in the majority below agreed, as an alternative ground of decision, that if what the contracting officer did constituted his notion of an equitable adjustment, he was wrong; and the respondent was right in its claim that the adjust-

[1] — C. Cls. —; F. Supp. —.

ment made was unfair and inequitable. To the Government's insistence that the question was one of fact and, therefore, to be settled finally by appeal to the department head, in accordance with Art. 15 of the contract, the court below replied that this court, in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, and *Securities Commission* v. *United States Realty Co.*, 310 U. S. 434, held that what constitutes an equitable adjustment is not a question of fact but a question of law. In this view they held that Art. 15 was inapplicable; that the contracting officer having erred in his construction of the contract had thereby breached its terms, and the respondents were entitled to sue for the amount of damage incurred by that breach.

The decisions cited are not authority for the principle that what is fair and equitable is always a question of law. Quite the contrary. In § 77B of the Bankruptcy Act it was provided that the court should confirm a plan of reorganization if satisfied "it is fair and equitable" and does not discriminate unfairly in favor of any class of creditors or stockholders. We held that, in this connection, the phrase "fair and equitable" had become a term of art, that Congress used it in the sense in which it had been used by the courts in reorganization cases, and that whether a plan met the test of fairness and equity long established by judicial decision was not a question to be answered by the creditors and stockholders but by the court as a matter of law.

An "equitable adjustment" of the respondent's additional payment for extra work involved merely the ascertainment of the cost of digging, moving, and placing earth, and the addition to that cost of a reasonable and customary allowance for profit. These were inquiries of fact. If the contracting officer erroneously answered them, Article 15 of the contract provided the only avenue for relief.

The judgment is reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S